



**The Council of Europe and the Creation of LGBT Identities
through Language and Discourse: a Critical Analysis of Case
Law and Institutional Practices**

Journal:	<i>The International Journal of Human Rights</i>
Manuscript ID	FJHR-2017-0049.R3
Manuscript Type:	Article
Keywords:	gender identity, sexual orientation, council of europe, european court of human rights, homonormativity

SCHOLARONE™
Manuscripts

The Council of Europe and the Creation of LGBT Identities through Language and Discourse: a Critical Analysis of Case Law and Institutional Practices

Setting the Stage for the Analysis: the Council of Europe and the Protection of LGBT Rights

This article¹ analyses the role of both judicial and non-judicial bodies of the Council of Europe (CoE) in creating and circulating specific notions of lesbian, gay, bisexual and transgender (LGBT) identities in the European human rights arena. The article does so by proposing a critical legal and queer analysis of some of the issues relating to sexual orientation on which the European Court of Human Rights (ECtHR) has ruled in the last three decades. This analysis is coupled by an ethnographic account of the linguistic practices relating to LGBT rights of Thomas Hammarberg, Commissioner for Human Rights of the CoE from 2006 to 2012. The article argues that the focus on specific words and expressions rather than others can be considered as an attempt, from the part of judicial institutions, to give juridical legitimacy to a limited portion of forms of sexual and gender identities available to individuals. At the same time, however, the work of former Commissioner Hammarberg seems to indicate that there are different linguistic and discursive practices that can be deployed by human rights institutions in order to escape essentialist, privatising and victimising language for LGBT persons.

This article does not adopt a systematic approach to the analysis of the entire body of case law of the ECtHR in relation to sexual orientation and gender identity. It may be argued, however, that the chosen case law is analysed in a systematic fashion, insofar as the author has sought to analyse different facets of the process of construction of LGBT identities in the ECtHR case law. The chosen strands of case law object of this critical analysis relate to three specific issues: the criminalisation of consensual sexual activities between adults, the criminalisation of sadomasochistic activities (and group sex), as well as the discrimination of lesbian, gay and bisexual persons in the armed forces. These strands of case law have been identified as offering interesting insights into the construction of an *essentialised, privatised, victimised* and *respectable* 'homosexual'. The article, however, does not only focus on the case law of the ECtHR, as it also discusses the juridical and non-juridical linguistic practices at the CoE concerning sexual orientation and gender identity. Within the European context, the CoE, and the ECtHR more specifically, have played a crucial role in bringing to the forefront the rights of LGBT persons, as well as allowing them to become 'sexual citizens' (Johnson 2012) and 'respectable' legal subjects in the human rights arena. This phenomenon, is attuned to the concept of

1
2
3 'homonormativity', coined by Duggan (2003, 50) to describe a type of politics that, on the one hand,
4 supports extant institutions (such as marriage, the army and so forth) at the place of displacing or
5 dismantling them, and on the other hand, depoliticises LGBT identities.
6

7
8 Whilst greatly contributing to the enhancement, visibility and protection of the human rights of
9 LGBT persons, the ECtHR and CoE have created *homonormative* – and *transnormative* – narratives
10 about sexual orientation and gender identity. The issue of the depoliticisation of LGBT identities
11 through inclusion into citizenry and access to human rights has prominently featured in the work of
12 several authors (Ammaturo 2014, 2015; Ashford 2011; Croce 2014; Franke 2004; Joshi 2012; Stychin
13 2003a and 2003b; Swennen and Croce, 2015). This article is in continuity with this strand of analysis,
14 and seeks to understand the extent to which human rights language can play a creative role in the
15 definition and of LGBT identities. In this regard, the article considers how language and discursive
16 practices can also be dynamically altered within human rights institutions, in order to better reflect the
17 complexity of the queer and LGBT identitarian spectrum.
18
19

20
21 This article contains four sections. In the first part, the European Convention on Human Rights
22 (ECHR) and its main principles of interpretation are presented. This is combined by a methodological
23 assessment of Queer Legal Theory and Critical Legal Theory as devices for interpretation of juridical
24 and institutional practices at the Council of Europe. In the section containing the analysis of the case
25 law, the author moves onto considering the way in which homosexuality has been constructed in the
26 case law of ECtHR, particularly through the categories of *essentialism*, *privatisation*, *victimisation* and
27 *respectability*. These categories constitute the building blocks of a domesticated homosexual subject
28 whose characteristics are presented as being immutable, whose desires are to be sheltered from the
29 public gaze, who appears as a passive subject of rights rather than an active actor, and whose
30 behaviours do not overtly offend extant public (heteronormative) morals. The third part compares and
31 contrasts the judicial discourse of the ECtHR on LGBT rights, with the independent work on LGBT
32 rights by the former Commissioner for Human Rights of the CoE, Thomas Hammarberg, with a specific
33 focus on the role of juridical and non-juridical language. This comparison shows a different
34 understanding and use of linguistic choices in order to construct LGBT juridical subjects and human
35 rights holders more in general. The fourth part summarises the findings and argues for a scrutiny of
36 the language of human rights used to adjudicate and protect LGBT rights. This enhanced attention to
37 linguistic practices and discourse helps to reduce the existing disconnect between the theory and
38 practice of human rights.
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53

54 **The European Convention on Human Rights: Principles, Interpretation and the Possibility for** 55 **Critical Legal and Queer Analysis** 56

This section will explain the role of various interpretative criteria of the European Convention on Human Rights (ECHR) deployed by ECtHR judges when adjudicating a case, as well as looking at how the case law can be analysed from both a critical legal and a queer legal perspective, rather than resorting to legal positivism (Hunt 1986, 4). Over the decades, the ECtHR has played a central role as sounding board for LGBT rights in Europe (Johnson 2012). Lodging a successful application before the ECtHR, however, is not easy. In 2016 alone, 82% of applications² (38,502 applications) were inadmissible under Article 35 ECHR. Although in theory every person, citizen or not of a given CoE member state, should be able to lodge an application with the ECtHR, the process is quite complex, and legal aid may be sought (Leach 2011). In this regard, third-parties, whose participation is regulated by Article 37 ECHR, are acquiring an increasingly important role in litigation before the ECtHR. In relation to LGBT applicants before the ECtHR, NGOs have often played an important part (Johnson, 2016, 179). ILGA-Europe, the biggest umbrella organisation in Europe for LGBTI³ rights, resorts to ‘strategic litigation’, in order to ‘us[e] a legal case to advance the rights of LGBTI people, usually as a part of advocacy campaign’⁴. The help of third-parties in drafting the application helps in maximising the persuasive impact of the claim. It is also important to point out that advocates (often employed in the NGOs acting as third-parties) play a crucial, and sometimes proactive, role in the creation of complaints and the arguments brought forward. Nejaime (2003) has claimed that advocates can sometimes privilege the general cause (for instance trying to obtain freedom to marry for lesbian, gay, and bisexual persons) at the detriment of the interests of a specific client. The danger, for Nejaime (2003, 516) is that advocates end up constructing the identity of the complainant in order to obtain a legal reform.

Moreover, every judgement is a tripartite document. In it, the applicant makes the claims relating to the violations of specific articles of the ECHR carried out by the national government, the imputed government responds to these claims, and the ECtHR operates the evaluation and assesses the merits of the case after having carried out an overview of the national legislation on the instant matter. This structure of the judgement, however, does not merely replicate the submissions of the parts, but it is the product of the ECtHR’s reconstruction of the submissions. In this regard, the absence of hearings, unless special circumstances require them (Article 40 ECHR), shows how the judgement is the written product of a synthesis that the ECtHR carries out in absence of a true ‘trial’ in the Courtroom.

In adjudicating the cases, the ECtHR employs a set of crucial interpretative criteria: the margin of appreciation, the consensus analysis, and the ‘living instrument’ principle. In relation to these criteria, Johnson (2012, 69-70) has suggested that the ECtHR often employs them without consistency. The principle of the margin of appreciation has its origin in *Handyside v. the United Kingdom* (1975) and it is based on the notion that, in relation to particular issues, national authorities are better placed

to evaluate the restrictive measures that are necessary in order to protect and ensure the respect of the rights of their societies. Hence, in some cases, states are entrusted with a high degree of autonomy in assessing whether an interference by national authorities pursued a legitimate aim and whether it did it in a proportionate way. In relation to issues relating to homosexuality (O'Connell 2009), this principle has had a determinant impact in the case law of the ECtHR, which has always proved extremely cautious in overstepping this margin of manoeuvre granted to member states.

The second important principle is the 'consensus analysis' based on an often sketched overview of the status of national legislation in all the member states on a specific matter. As Johnson (2012, 77) has also reminded, the 'consensus analysis' principle seems to lack methodological coherence, often resorting to either incomplete or missing data (Johnson 2012, 80-81). This implies, in turn, that the ECtHR may ground its reasoning more on perceptions or reconstructions of the consensus on a specific topic, rather than on legal overviews or sociological evidence on attitudes and perceptions in the societies of the different member states.

Thirdly, the ECtHR relies on the 'evolutive principle', also defined as the 'living instrument principle' (*Tyrer v. the United Kingdom*, 1978). This principle concerns the necessity, for the ECtHR, to interpret the ECHR under the light of present-day conditions, which is to say as an instrument that is malleable and whose principles can be used in order to assess human rights violations in the present. This principle, in particular, represents that 'element of dynamism and development that constitutes the essential characteristic of the European system of protection of human rights' (De Salvia 2006, 69).

These three principles provide useful guidance in order to undertake the analysis of the case law. Furthermore, acknowledging these interpretative principles helps to better appreciate the role played by linguistic choices operated by the ECtHR in the deliverance of the judgments. As has already been hinted to, this analysis departs from legal positivism as a 'scientific method' of studying law as being inherently objective, legitimate and characterised by rationality and predictability (Hunt 1986, 4). Whilst firmly grounded in the conviction that the ECtHR has been a fundamental actor in ensuring crucial and enhanced protection of the rights of LGBTI persons in Europe, this analysis embraces *critique* rather than *criticism* of the work of the CoE on LGBT rights. In line with the critical legal theory tradition of 'deconstruction' of the case law, this analysis seeks to highlight the political nature of the law, particularly looking at how legal language both 'embod[ies] and implement[s] power' (Baron and Epstein 1982, 673). For sociologists of human rights, who interrogate themselves on the socially constructed nature of human rights discourse (Bobbio 1996, O'Byrne 2016), this attention to the 'linguistic turn' in the analysis of human rights allows to engage with structures of power underlying the construction of specific human rights narratives. Ultimately, reflecting on the language of human rights can enhance its capacity of closely representing the subjects whose interests it purports to represent.

For this specific analysis, the underlying productive narrative relates to the *essentialised, privatised, respectable* and *victimised* ‘homosexual’. This particular Foucauldian focus on the active production of the ‘homosexual’ (juridical) *personnage*, calls into question the contribution of a queer legal approach to the analysis of the case law. ‘Queer legal Theory’ has been conceived as a synthesis between the normative domain and the open network of extremely diversified queer experiences. On the one hand, it rejects dominant social norms regarding sexuality, gender, intimacy and kinship. On the other hand, it engages with the legal articulation of these same predominant norms (Romero in Fineman et al. 2009, 190). Its contribution can be said to be complementary to liberal legal positivistic analysis, as enables to go beyond the received notion relating to the determinacy and immanence of legal language. The intention here, therefore, is not that of ‘trashing’ liberal legalism (Ward 1998, 156). On the contrary, the objective is that of pointing out that the ECtHR has contributed to create and crystallise a specific vocabulary to describe the constellation of sexual and gendered identities of applicants, their lives, as well as their attributes as human rights holders.

Normalisation through Juridical Discourse: the Construction of “Homosexuality” within the Case Law of the European Court of Human Rights

Discussions on the theoretical and empirical foundations of human rights have been central in the work of several sociologists of human rights such as Turner (1993), Waters (1996), Bobbio (1996) and Rorty (2011) to cite a few. Whilst expressing various degrees of scepticism regarding the usefulness and success of human rights, sociologists acknowledge the role of human rights as a crucial political and social *currency* in contemporary global discourses on justice, equality and freedom. Notwithstanding the crucial function human rights fulfil, a critical scrutiny of the discursive practices they give rise to can only contribute to strengthen the level and quality of protection of individuals’ rights, rather than subtracting to the positive role that human rights may have in the life of specific groups of individuals such as LGBT persons. This is because, sometimes laws and policies to combat discrimination are often insufficient to protect individuals if these fail to address the removal of structural inequalities and/or address discrimination from an intersectional point of view. In relation to discrimination on grounds of sexual orientation and gender identity, the anti-discrimination rhetoric may be said to only marginally tackle the problem, as Beger (2004, 108) has argued:

This quest for anti-discrimination is premised upon a particular understanding of society; namely that it contains a variety of diverse minority-like populations, each of which suffers a kind of antiquated prejudice no longer tolerable in liberal democracies. The state or the pan-European institution then acts as a neutral protector, facilitating the eradication of what is seen

to be individual aberrations through the passage and enforcement of anti-discrimination measures (Beger 2004, 108).

Here Beger (2004) suggests that, in exclusively being framed as 'victims of discrimination', individuals become embedded in crystallised power positions, and potentially dependent on the actions of institutions for their safety and protection. This dilemma reproduces, to some extent, the classical (and problematic) sociological distinction between the importance of *social structure* and the role of *individual agency*.

Decriminalisation of Consensual Same-sex Sexual Practices

The first (unsuccessful) complaints reached the European Commission on Human Rights⁵ of the CoE in the 1950s and concerned the decriminalisation of same-sex sexual practices between two consenting men. It was only with *Dudgeon v. the United Kingdom* (1981), however, that the ECtHR ascertained for the first time a violation of the right to private life (Article 8 ECHR) for the applicant, a gay man residing in Northern Ireland. Together with the above-mentioned case, two other cases (*Norris v. Ireland*, 1988 and *Modinos v. Cyprus*, 1993) are of interest for this analysis. In *Dudgeon v. the United Kingdom* (1981), the complainant alleged that the criminalisation of homosexual acts (mostly unenforced in practice) in Northern Ireland constituted a violation of his rights to respect of private life. He also alleged a breach of the non-free-standing article 14 ECHR, insofar as the above-mentioned legislation was discriminatory against men⁶ in relation to both heterosexual individuals and homosexual women (who were not criminalised for same-sex sexual activity).

The warp and weft of the judgement are the terms *privacy* and *morality*. Weaving them together without contradictions, however, may be difficult. The ECtHR reiterated the importance of the 'moral ethos of a society as a whole' (*Dudgeon v. the United Kingdom*, 1981: para 49) in order to evaluate the existence of an interference in the enjoyment of Article 8 ECHR. This formulation points to the idea of a community, to a common and shared moral compass that the state has the duty to protect and preserve. However, the ECHR also recognised that the case concerned a 'most intimate aspect of private life' (*Dudgeon v. the United Kingdom*, 1981: para. 52). Hence, if the 'moral ethos' pertains to the public sphere, can it invade the presumed privacy of sexual life? The ECtHR ruled out that this 'moral ethos' could permeate the private sphere so deeply as to cause an interference in the sexual life of consenting adults. Whilst ascertaining a violation of the right to respect of private life under Article 8 ECHR for Mr. Dudgeon, however, it did so in an ambiguous way:

Decriminalisation does not imply *approval* [my emphasis], and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation

does not afford a good ground for maintaining it in force with all its unjustifiable features (*Dudgeon v. the United Kingdom*, 1981: para. 61).

This passage highlights the philosophy of *tolerance* (*Dudgeon v. the United Kingdom*, 1981: 60) foregrounding the reasoning of the ECtHR. The statement ‘decriminalisation does not imply approval’ denotes the existence of a moral undertone in the words of the ECtHR that can be traced back to both the heteronormative matrix of the nation-states, as well as to the triangular relationship between a ‘guardian’ (the ECtHR), a paternalistic state, and individuals.

Furthermore, the ECtHR had found that no violation of the anti-discrimination provision (Article 14 ECHR) existed in this case. Judge Matscher, in his dissenting opinion, concurred with it, but added that it was not possible to ascertain the absence of a breach of an anti-discrimination article in the case of the criminalisation of male homosexuality, neither in relation to homosexuality nor in relation to female homosexuality. This was due to the ‘genuine difference, of character as well as of degree, between the moral and social problems raised by the two forms of homosexuality, male and female’ (*Dudgeon v. the United Kingdom*, 1981: para. 32). Interestingly, Judge Matscher had not defined those ‘social’ and ‘moral’ differences associated with male and female homosexuality, but had – implicitly – made an association between male homosexuality and penetration and, by extension, to danger. This veiled rhetoric of ‘danger’, denotes the existence of hidden power relations within the male world, where only male homosexuality has the potential of destabilising society and the homosexual woman is invisible⁷ and inoffensive. This example highlights the essentialist depiction of the ‘homosexual man’ as being entirely identified with his penetrative potential and his sexual behaviour.

Dudgeon v. the United Kingdom (1981) presents several points of similarity with later case law, particularly with *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993). Firstly, in both Northern Ireland and Cyprus, there was non-enforced legislation⁸ aimed at prohibiting male homosexuality. Secondly, in all the cases, the three plaintiffs were activists from gay organisations whose objective was that of obtaining de-criminalisation of homosexuality, not just in practice but also in the context of criminal law. They did not just want the police to stop harassing them both in private and public, but were also calling for the removal of criminal sanctions for same-sex consensual sexual contact in the statute books. In this regard, the absence of application of criminal sanctions contributed to the creation of a situation of uncertainty that, as outlined by the plaintiffs, produced a prolonged interference with their right to a private life. This aspect can be configured as a disciplinary technique *à la Foucault*, seeking to regiment (homosexual) bodies whilst threatening them with the possibility of a criminal sanction. In the three above-mentioned cases, the plaintiffs had claimed they had suffered from marked psychological distress (*Dudgeon v. the United Kingdom*, 1981: para. 37; *Norris v. Ireland*, 1988: para. 10; *Modinos v. Cyprus*, 1993: para. 7), recognised by the ECtHR. The subtle but generalised

state of uncertainty had produced, in fact, a situation of constant vigilance from the part of both the individuals and the state.

Complementary to this aspect is the status of the applicant as human rights activists who ascribed to themselves the status of *victims*. To claim the status of victim one has to have suffered a personal injury (Article 34 ECHR), as there is no *actio popularis* available under the ECHR. At the same time, the plaintiffs used their activism as a tool to dismantle the (already weakened) national legislation on homosexual contact between adults. Against this background, the ECtHR judged the degree of severity attained by the State's behaviour or acts. Privacy proved to be central in these cases. Had it not been for the emphasis on the fact that sexual activity was an 'intimate' aspect of one's life, no interference would have been detected by the ECtHR. At the same time, the fact that the state could indicate what was the standard for proper sexual contact between consenting adults went undetected. This example indicated the discretionary criteria employed by the ECtHR in deciding whether states' actions amount to a violation of individuals' fundamental rights. *Dudgeon v. the United Kingdom* (1981) was a landmark decision, with positive reverberations on legislation of CoE member states that still criminalised some forms of consensual sexual activities between individuals of the same sex (Wintemute 1995; Johnson 2012). The judgement, however, did not dismiss the principle of a paternalistic and voyeuristic gaze of the state monitoring and evaluating the appropriateness of specific sexual behaviours as having not just personal, but also social consequences.

Sadomasochistic Sexual Practices and Group Sex

So far, the analysis has considered the way in which the ECtHR, in its early judgments on the decriminalisation of same-sex sexual conduct carried out in the 1980s, has predominantly framed the 'homosexual' plaintiffs as being an *essentialised* and *privatised* socio-juridical actor. The relegation to this sketched depiction of homosexuality highlighted how the ECtHR condoned the way in which national states were willing to *tolerate* the 'homosexual' subject as long as *HE* did not subvert the heteronormative order of society and/or the national mores. This tendency for partially upholding the moralising and paternalistic disciplinary gaze of the nation-state by the ECtHR, is also evident in the case law concerning the criminalisation of sadomasochistic activities and group sex among consenting adult ('homosexual') males. The judgments object of the matter here are *Laskey, Jaggard and Brown v. the United Kingdom*⁹ (1997) and *A.D.T. v. the United Kingdom* (2000), concerning respectively sadomasochistic practices and group sex. As for the former case, the circumstances were of non-specified number of men (out of forty-four participants) charged by British national authorities with offences including assault and wounding (*Laskey, Jaggard and Brown v. the United Kingdom*, 1997: para.

8) for having committed sadomasochistic practices¹⁰ filmed over a period of ten years. Applicants alleged a violation of their right to private life (Article 8 ECHR) rejected by the ECtHR. The latter case involved the seizure, by police officers, of video tapes at the applicant's house that depicted him engaging in sexual intercourse with up to four adult men (*A.D.T. v. the United Kingdom*, 2000). The charge against the plaintiff had been that of 'gross indecency'¹¹. The applicant alleged a violation of Article 8 ECHR and Article 14 ECHR in conjunction with Article 8 ECHR before the ECtHR and the applicant's complaint was successful.

Commenting directly on the decision in *Laskey, Jaggard and Brown v. the United Kingdom* (1997), Califia (2000, 144) has aptly synthesised the relationship between the ECtHR and the different positions occupied by (different) 'homosexual' complainants:

Homosexuals and transsexuals have convinced the [ECtHR] to see them as vulnerable minority groups which need protection from a bigoted state. Sadomasochists are a long way from winning a similar status, partly because we don't often think of ourselves that way, and don't represent ourselves as such in front of the general public (Califia 2000, 144).

Califia's argument here can be seen in a specular fashion to Gayle Rubin's (1998, 107) famous concept of the 'hierarchical system of sexual value', which postulates that, depending on the type of sexual activity individuals engage in, they will be hierarchically ranked in terms of their political, social, moral, material and legal status. In this regard, Rubin (1998, 107) argued that sadomasochists were among the 'most despised sexual castes', whilst reproductive heterosexuals ascended to the top of what she called the 'erotic pyramid' (Rubin 1998, 107). Here, however, it is also important to note that, whilst sadomasochists can be both heterosexual and homosexual, it is nonetheless true that sadomasochistic practices and identities are a part, albeit minoritarian, of queer politics. Thus, whilst most discussions on the rights of LGBT persons will not address sadomasochistic practices, it is interesting when this highly stigmatised set of sexual practices (and associated identities) *intersects* with the 'homosexual' sexual orientation of the plaintiff in the case law of the ECtHR.

Back to Califia's argument, it is possible to understand the failure of *Laskey, Jaggard and Brown v. the United Kingdom*. Since sadomasochists refused to speak about themselves as victims, the ECtHR was incapable of recognising a coherent narrative of victimisation leading to a limitation of the public interferences of state authorities on health and moral grounds. The refusal to be seen as victims entails a symbolic exit from that negotiated terrain of subjectivity played out before the ECtHR. Furthermore, since the ECtHR found legitimate the prosecution enacted by the member state under Article 8(2) ECHR for protecting 'health' (*Laskey, Jaggard and Brown v. the United Kingdom*, 1997: para. 50), complainants were portrayed as *perpetrators*, rather than *victims*. Corollary to this may also be the fact that the ECtHR may have been influenced by the fact that one of the plaintiffs, Mr. Laskey, had been

convicted in a parallel legal proceeding for the possession of an indecent photograph of a child (*Laskey, Jaggard and Brown v. the United Kingdom*, 1997: para. 11).

The ECtHR approach to sadomasochistic activities in private differed from its approach to group sex, particularly in relation to issues of *victimisation* and *privacy* of the individuals involved. In the case of *A.D.T v. the United Kingdom* (2000), the narrative of the complainant was successful in ensuring that ECtHR perceived the applicant as a victim of the state's interference by terms of Article 8 ECHR. The ECtHR emphasised this aspect by saying that, although the applicant had filmed the acts, he was worried for his *anonymity* (*A.D.T v. the United Kingdom*, 2000: para. 36). Therefore, beyond the necessity of assessing whether group sex fell within common moral standards of the member state, the ECtHR implicitly made an evaluation of the inoffensiveness of the complainant who engaged in activities which were 'genuinely private' (*A.D.T v. the United Kingdom*, 2000: para. 37). Here reference can be made to Franke's (2004, 1410) commentary on how some 'raunchy forms of sex' can be admitted only if committed within the context of marriage, or if they are not likely to become known in the public domain.

A.D.T v. the United Kingdom (2000) is often compared in legal analysis (Grigolo 2003; Johnson 2012) to *Laskey, Jaggard and Brown v. the United Kingdom* (1997). This is predominantly because of the different margin of appreciation (narrower in the former, wider in the latter) afforded by the ECtHR to the nation state, but also because the applicant had made clear that in the seized videotapes no trace of sadomasochistic activity was recorded (*A.D.T v. the United Kingdom*, 2000: para. 10). This contributes to suggest that the ECtHR may have considered sadomasochistic activities between 'homosexual' individuals as ranking lower on the 'erotic pyramid' (Rubin 1998, 107) than group sex between 'homosexual' persons, and thus needing a closer scrutiny from the part of the UK Government.

Here, however, a further useful layer of analysis would be that of considering the occurrence of an intersection between sadomasochistic identities and the sexual orientation of the plaintiffs in *Laskey, Jaggard and Brown v. the United Kingdom* (1997). Over the years, the ECtHR has adjudicated at least three cases (*K.A. And A.D.V. v. Belgium* 2005, *Pay v. the United Kingdom* 2008, and *Mosley v. the UK* 2011) concerning sadomasochistic activities by heterosexual individuals. For all the three cases, ECtHR' decisions have been consistently negative for the plaintiffs. Whilst the ECtHR only marginally touched on lawfulness of consensual sadomasochistic activity between consenting adults in *Mosley v. the UK* (2011), the other two cases (*K.A. and A.D.V. v. Belgium* and *Pay v. the UK*) show that the ECtHR may be uncomfortable with the very concept of appraising, evaluating and adjudicating on so-called 'non-traditional' sexualities. This is because, in both the above-mentioned cases, the ECtHR makes abundant references to issues of morality as being contrasted with the necessity of fostering a 'tolerant' and 'broad-minded' society. Sadomasochistic practitioners, therefore, be them heterosexual or homosexual, seem to be subjected to a similar pattern of moralistic gaze from the part of the judicial

body, again complying with the enforcement of Rubin’s (1998, 107) concept of the ‘hierarchical system of sexual value’.

Discrimination of Gay and Lesbian Personnel in the Armed Forces

Questions relating to the *essentialisation*, *privatisation* and *victimisation* of the ‘homosexual’ juridical personage, however, would not be complete without a corollary engagement with the notion of ‘respectability’. Discourses on the ‘respectability’ of the homosexual citizen feature prominently in queer scholarship (Richardson 2005; Warner 1993; Joshi 2011) and relate to the oscillating pendulum between *celebration* and *suppression* of identity in gay and lesbian social movements identified by Bernstein (1997). Traditionally, most discussions on the respectability of LGBT persons take place in relation to the homonormative character of same-sex unions and the ‘passing’ of trans persons within a cisgender(ed) society. In the case law¹² of the ECtHR, particularly in the judgements concerning same-sex unions (and marriage), as well as the parental rights of LGB persons, the ECtHR has clearly emphasised the character of ‘normalcy’ of same-sex couples (and single individuals wishing to adopt children) vis-a-vis the heterosexual counterparts (Ammaturo 2014). At the same time, confining discussions on the ‘respectability’ of LGB(T) persons solely to the sphere of same-sex unions would be reductive, as there are other strands of the ECtHR case law that show relevant patterns of ‘normalisation’ of homosexuality. As has been already pointed out, the focus of this analysis remains on the creation of the ‘homosexual’ *personnage* beyond the context of homoaffective relations and, therefore, the case law relating to same-sex unions and marriage and parenting rights has been left out.

When it comes to respectability in relation to the ‘homosexual’ individual, the case law of the ECtHR concerning the dismissal of members of the armed forces (all in the United Kingdom) on grounds of their homosexuality, can serve as a good illustration. In both *Lustig-Prean and Beckett v. the United Kingdom* (1999), and *Smith and Grady v. the United Kingdom* (1999), all four applicants were discharged from the armed forces after extensive and intrusive investigations carried out in order to ascertain their sexual orientation. The four applicants alleged a violation of Article 8 ECHR and of Article 8 in conjunction with Article 14 ECHR. This strand of case law is important firstly because it weakened the widely held conviction that homosexuality could be ‘dangerous’ for society and required ‘containment’ (Johnson 2016, 63). At the same time, however, the case law also sheds light on the process by which, in the military, a denial of homosexuality was enacted by means of the construction of a paradoxical ‘homosexual military subject’¹³ (Cooper in Bell and Binnie 2006, 64). This process had inevitably led to the emergence of patterns of disavowal, secrecy, and shame in the applicants, and

more broadly, in other members of the armed forces. Ultimately, the case law on 'homosexual' members of the armed forces requires a consideration between the fitness of the 'homosexual' person to represent and serve the nation, as well as the role of the armed forces as the access gate to the granting of full citizenship status for lesbian, gay and bisexual persons. The conclusions that can be drawn on the development of a concept of 'respectability' within the context of the case law of the ECtHR on LGB persons in the armed forces, is undeniable of relatively limited reach. At the same time, it contributes to debates on the desire for inclusion into citizenry and crucial institutions (i.e. the army) that animates mainstream LGBT activism.

The two above-mentioned judgements present intersecting narrative lines. In their submissions¹⁴, all the parties (the applicants, the British government, and the ECtHR) referred to the same ideas of *excellence*, *professionalism* and *security*. The invisible red thread that connects them is the notion of respectability of LGB persons as members of the military. The reason for the discharge of LGB personnel in the United Kingdom derived from the 1994 Guidelines which maintained that LGB personnel 'damage the morale and unit effectiveness' (*Lustig-Prean and Beckett v. the United Kingdom*, 1999: para. 42), causing a breach in the protection of national security. In order to counter this argument, all four applicants in the two different cases had submitted their records of service as proof not just of their suitability, but of their *excellence* in their work. In its assessment of the alleged violation of the right to private life, the ECtHR reinstated the existence of such an excellent record of service for the applicants (*Lustig-Prean and Beckett v. the United Kingdom*, 1999: para 85 and *Smith and Grady v. the United Kingdom*, 1999: para. 95). This emphasis was undeniably crucial in order to ascertain whether the sole reason for the applicants' discharge was their homosexuality. At the same time, however, it led to an overstated on the fact that lesbian, gay, and bisexual individuals in the military were capable of serving the country in an *irreprehensible* way.

Would have the plaintiffs' claims been equally strong, had their record of service been *mediocre*, rather than *excellent*? The logic of the 'role model', by which exceptional achievements of [LGBT] persons are highlighted in different fields, can be a 'double-edged sword'. Firstly, 'role models' may either enhance or deflate personal self-esteem in different individuals (Lockwood and Kunda 1997). Additionally, they can contribute to the reinforcement of what McGuigan (2014) has called the 'neoliberal self'. In conjunction with the case law analysed in the previous sections of this article, these two strands of judgements lead to two important reflections. Firstly, it can be noted that the plaintiffs engage in a dialectical dialogue with the ECtHR in which they seem to be aware of the fact that juridical language requires a 'reduction' of the real experience (and, therefore, a banalisation of identities). This can otherwise be expressed, in the words of Croce (2014, 10) as a process whereby LGBT subjects self-surrender to a model that has oppressed them for centuries, a model characterised by a 'juridical normalisation of homosexuality'. Secondly, the judges of the ECtHR actively participate to the validation and circulation of 'dominant' arguments on respectable LGBT persons by means of a rigorous use of

juridical language which appears to be autonomous and circular (Croce 2014, 12). In this regard, Johnson (2012, 33) has gone as far as arguing that complainants to the ECtHR have substantially subscribed – if not encouraged in the first place – to the circulation of the essentialist view of homosexuality, leading to the creation of a direct link between the humanness of the homosexual plaintiff and the humanness of the subjects of human rights. This aspect raises important questions concerning the ‘authorship’ of complainants, a question that has been recently addressed in the work of Johnson (2016).

Beyond the Case Law: a Comparison between the ECtHR and the CoE Commissioner for Human Rights on the Linguistic Choices to Describe Gender and Sexuality

So far, the analysis has focused on the specific strands of case law of the ECtHR relating to sexual orientation. In order to broaden the discussion on language used in human rights to describe sexual orientation [and gender identity], however, it is possible to undertake a comparison between the linguistic practices of the juridical body of the CoE (the ECtHR) and its independent body (the Commissioner). The ECtHR, in fact, is not the only body at the CoE involved in the negotiation of vocabulary concerning sexual orientation and gender identity. In 2011, the then Commissioner Hammarberg published a pioneering report on homophobia and transphobia in the 47 CoE member states (Commissioner 2011). During the editing process, in Autumn 2010, I carried out a four months ethnography at the office of the Commissioner, having direct insight into the discussions between him and his team in relation to editorial and linguistic choices for the report. Although the Commissioner consistently adopts a different language concerning sexual orientation and gender identity from that of the case law of the ECtHR, by adopting a more inclusive and less pathologising descriptive language, he nonetheless participates to the process of normalisation of sexual and gender identities in the socio-juridical sphere.

Notwithstanding the attempts of freeing it from its original medical connotation, the word ‘homosexual’ retains a pathologising aura (Donovan 1993, 30). Yet, the term is still commonly used and, in relation to this analysis, it appears to be the privileged term employed by the ECtHR when referring to an individual with a specific sexual orientation (either ascribed or self-assumed). It is striking that since the first complaints were lodged before the ECtHR in the 1950s¹⁵, the vocabulary of the ECtHR relating to sexual orientation and/or gender identity has not been dramatically transformed. At the same time, other CoE institutions (the Committee of Ministers, the Parliamentary

Assembly and the Commissioner), have also played a part in the advancement of LGBT rights in Europe. In the last ten years, in particular, the independent figure of the Commissioner, has acted as strong catalyst for the streamlining of LGBT(I) issues at the CoE. The 2011 report on homophobia and transphobia in the CoE member states (Commissioner 2011), represents a pivotal event in this direction. Beyond the issues of the breadth of contents covered in the report, its importance lies in the linguistic choices adopted by Commissioner Hammarberg and his team. In its preliminary phase, the process of editing of the report required an effort to bring linguistic coherence to the text. The team working on the report sought to carry out, in particular, a process of *de-essentialisation* of homosexuality, in favour of a different understanding of the interplay between sexuality and personhood. In the few instances in which the term had been retained in the 2011 Report, the word homosexual was used as an adjective, rather than as a noun. The same applied to *lesbian* (a lesbian woman), as well as to *bisexual* (a bisexual person / man / woman) or *transgender* and *intersex* (a transgender/ intersex person) (Commissioner 2011). Whilst the difference between *homosexual* (noun) and *homosexual* (adjective) may seem trivial, it has, instead, a profound impact on the construction of the arguments: homosexual as a noun is self-sufficient and self-standing. In fact, the noun can be used to promote an essentialist vision of sexual orientation. Zwicky (cited in Livia and Hall 1997, 22) attributed the preference for adjectives rather than nouns to the fact that nouns reduce the individual to that single property, while adjectives designate one characteristic out of many. *Homosexual* (or *lesbian*, *bisexual*, and so forth) as an adjective, therefore, is used as an addition, a non-essential part of the speech, not as a substitute for the individual himself.

Another choice operated by the Commissioner beyond the issues of *de-essentialisation*, has been the decision to prefer the word persons rather than people after adjectives such as LGBT / gay / lesbian / bisexual / transgender and intersex. The *persons v. people* issue signals an important move: from a collective anonymous and unspecified group of subjects, to an empowering depiction of active individual agents. Perfectly fitted with the demands of neoliberal human rights rhetoric, the *persons v. people* issue signals here the need to move from an essentialist conception of sexual orientation and/or gender identity to a non-essentialist characterisation. At the same time, however, this process implicitly reduces the symbolic significance and powerfulness of a term that stands for collective empowerment such as 'people'. The effects of these linguistic choices can be said to be controversial, since they simultaneously de-materialise LGBT identities as collective and re-materialise them as individual positions with relatively weaker communal and cultural ties. Here a critical connection can be established with Marx's (1977) polemical argument on the concept of *individual* rights as the rights of the 'selfish man'.

There are significant differences between the language in use at the ECtHR and at the office of the Commissioner for Human Rights. In the work of the latter, there has been almost a complete substitution of the word homosexual with the word *gay* (although always used as an adjective as in gay

man). Zwicky (cited in Livia and Hall 2007, 22) sums up the difference between the two terms by pointing to the *behaviour v. identity* dichotomy. In the case law of the ECtHR, where the judges use linguistic expressions such as ‘consciously homosexual’ (*Dudgeon v. the United Kingdom*, 1981), ‘the private life of an homosexual’ (*Fretté v. France*, 2002), ‘equality of the rights of homosexuals’ (*Karner v. Austria*, 2003), there is evidence of a taxonomical description of ‘the homosexual’ akin to that described by Foucault. On the contrary, the former Commissioner’s choice to use *gay* rather than *homosexual*, seems to suggest the abandonment of such taxonomic approach. Whilst still problematic, the term *gay*, points to different relations with other fields of life rather than simply sexual desire or behaviour. More specifically, it is linked to the existence of relationships with the public sphere, to cultural phenomena and understandings and appropriations of homosexuality (Donovan 1993).

Power relations play a significant role in the choices adopted by different actors at the CoE. Contrarily to the austere image of the ECtHR, the role of the Commissioner is that of a dynamic institution who crucially engages in dialogue with NGOs, as well as national authorities and other stakeholders. For this reason, the Commissioner has no interest in employing ‘scientific’ (hence reliable, neutral, objective) terms, as it is the case for the case law of the ECtHR. For this reason, the linguistic choice of the term *gay* goes in the direction of building a bridge between the aseptic version of homosexuality produced by the ECtHR, and the kaleidoscope of sexual expression experienced by real individuals. Another illustration of this intention is the use of acronym ‘LGBT’ is widely employed throughout the 2011 Report, including a preliminary reference to the possibility of including ‘Q’ for queer and ‘I’ for intersex. This choice signals a relative interest and familiarity, on the part of the Commissioner, with the world of human rights activism, as well as an interest in communicating the existence and worth of these organised networks to his main intended audience: national authorities. The language adopted by the former Commissioner, therefore, is much more comprehensive than the one adopted by the ECtHR.

Furthermore, the differences between the linguistic choices of the ECtHR and the former Commissioner were not limited to words concerning sexual orientation, as they also concerned the different uses of the terms *transgender/ transsexual* (as either adjectives or nouns). While the former is more inclusive in terms of persons who can fall within the process of crossing gender (and sex) lines; the latter, highly medical connoted, defines a much narrower group of individuals who may wish to undergo or have undergone some form of gender confirmation surgery in order to cross the ‘line’ of biological sex. It is worthy pointing out that some transsexual persons do not feel relatedness or belonging with the transgender community, as they may wish to ‘pass’ in the sex and gender that the surgeon(ies) have helped to confirm (Roen 2002, 502). All the case law of the ECtHR to date has invariably adopted this ‘psychomedical construction’ (Roen 2002, 502). Even in *Goodwin v. the United Kingdom* (2002), considered by many a landmark case¹⁶ of the ECtHR’s case law on gender identity, the language employed is heavily connoted in medical terms. In considering the ‘applicant’s situation as a

transsexual' (*Goodwin v. the United Kingdom*, 2002: para. 76), the ECtHR reinstated the importance of passing and, indirectly, of respectability. This is in accordance to what Roen (2002, 502) has defined as being part of 'liberal transsexual politics'. 'Liberal transsexual politics' appears to be the dominant framework in human rights discourses, standing in opposition to forms of transgression and transcendence that could be defined as 'radical politics of gender transgression' (Roen 2002, 502). The ECtHR, therefore, by exclusively employing the word transsexual as a noun, promotes a strong objectification of individuals who cross the lines of sex and/or of gender. At the same time, of course, it is necessary to also acknowledge that most cases analysed by the ECtHR, concerned individuals who had surgically crossed (or wished to) the line of biological *sex*, as well as that of *gender*. The work of the former Commissioner on issues relating to gender identity seems to be informed by a non-essentialist, although cautious, approach with respect to the case law of the ECtHR. In the 2011 Report, the Commissioner had questioned the requirement of sterilisation for transgender individuals in place in most CoE member states to have their name and/or gender legally recognised. In the Report, however, the Commissioner did not advocate for a substantial abandonment of the female/male dichotomy.

Furthermore, whilst the Commissioner undeniably adopted a much more inclusive language, the underlying rhetoric concerning LGBT identities and rights retained 'homonormative' undertones. In general, his work built on the concept of the presumed universal character of human rights and the idea of 'sameness' for LGBT persons (Commissioner for Human Rights of the Council of Europe 2011, 35). The work of the Commissioner did not engage at any point with forms of 'raunchy sexuality', defined by Ashford (2011) as 'erotic challenges' to the law, in direct opposition to 'a juridical homonormative discourse'. Because of his peculiar role as mediator between civil society, national authorities and the CoE, the Commissioner enacted strategies aimed at enhancing the persuasive character of his actions or statements. Implicitly, therefore, the work of the Commissioner consists of an effort to demonstrate the 'sameness' of LGBT persons by contributing to construct them as being normal.

At a glance, the difference between the (juridical) language of the ECtHR and the language of the Commissioner in defining LGBT identities and plaintiffs seems to have a twofold motivation. On the one hand, there is the necessity for juridical institutions, such as the ECtHR, of embracing legal positivism in order to achieve objectivity, predictability and impartiality in the adjudication of cases. On the other hand, there is the acknowledgment that the law is socially situated, and promotes 'hegemonic' understanding of (sexed and gendered) identities. Whilst the language of the ECtHR cannot be directly permeated by external intervention (i.e. from the part of the Commissioner), it is nonetheless necessary to foster a much more sociologically-informed analysis of social, political, personal circumstances of applicants, also in light of ECtHR judges personal 'activist' orientations (Voeten 2007).

Better Human Rights Protection through Better Language? An Agenda for Future Developments

From a sociological perspective, O’Byrne (2012, 835) has emphasised the configuration of human rights as ‘language-structure’, that is a ‘language employed to describe a particular set of social relationships’. In O’Byrne’s opinion (2012, 85) this implies that this ‘language’ is malleable enough as to allow the attribution of (different) meaning(s) by distinct groups of individuals with diverging interests. If one acknowledges the need of interpreting the ECHR as a ‘living instrument, which must be interpreted in the light of present-day conditions’ (*Tyrer v. the United Kingdom*, para. 4), it is possible to suggest that human rights language should also reflect more closely the experiences of plaintiffs. This would allow to and break away from essentialist depictions of individuals flattening and reducing their juridical status as rights holders. The linguistic aspect of human rights appears ever more important if one acknowledges that LGBT identities and issues are multifarious, multidirectional and often intersecting with other individual characteristics.

The language used to describe gender, sexuality and gender identity has been the object of Queer Linguistics (Motschenbacher 2010) and there are discussions on the ‘linguistic reclamation’ (Brontsema 2004) of formerly derogatory terms used to address LGBT persons. More broadly, the question of the choice of terminology appears prominent (and often contested) in the work of LGBT activists (Gamson 1995). Because of the central role of language and linguistic performances in the description and articulation of LGBT identities, it is necessary to interrogate the limits of legal positivism in acknowledging the nexus between (sexual and/or gender) *behaviour* and *identity*. Far from suggesting that a legal positivist approach to LGBT rights in relation to the work of the ECtHR is redundant, this analysis has brought to the forefront the triangular relationship between language, power relations and the law from a Foucauldian perspective. The analysis of the case law has shown a tendency by the ECtHR to focus on ‘homonormative’ narratives relating to homosexuality. The combined focus on the work of the Commissioner has hinted to the fact that, outside the field of juridical language, more flexibility in linguistic expressions on LGBT identities can be expressed but that the underlying rhetoric of ‘essentialisation’ and ‘normalisation’ of LGBT persons is still prevalent.

Ultimately, the promises of Queer Legal Theory of ‘queering the law’ appear incapable of endowing human rights scholarship with that subversive sense of ‘indeterminacy’. This incongruence between the revolutionary potential of queer theoretical engagements with the liberal positivism of human rights law does not exclude, however, that in the future the ECtHR can pay more attention to the language employed in the judgments. Furthermore, the ECtHR would benefit from becoming more *reflexive* on its linguistic practices and the underlying sociological criteria employed to define and

relate about different identitarian positions, both within and beyond the spectrum of LGBT identities and queerness. Ultimately, the enhanced attention to linguistic and sociological practices of the ECtHR may enhance its capacity to address human rights violations from an *intersectional* perspective.

¹ A previous version of this article has previously been published in French in the Journal *Genre, Sexualité et Société*.

² European Court of Human Rights, *The Online Admissibility Checklist*, available at: http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=#n1357809352012_pointer, accessed 31 October 2017.

³ The “I” is here included for “intersex persons” but does not appear when analysing the case law, as there are no relevant cases adjudicated on these issues by the ECtHR.

⁴ ILGA-Europe, *A Factsheet on Strategic Litigation to promote LGBTI Rights in Europe*, available at: http://ilga-europe.org/sites/default/files/Attachments/factsheet_ligation_www.pdf, accessed 27th April 2017.

⁵ Until its abolishment by Protocol 11 ECHR in 1998, the Commission (established in 1954) decided on the admissibility of applications before bringing them to the ECtHR (only established in 1959). After the entry into force of Protocol 11 in 1998, an enlarged ECtHR started to carry out decisions on admissibility for received applications.

⁶ For more details on the limited applicability of the 1967 Sexual Offences Act to Northern Ireland, see Johnson (2016, 30 and 77-82).

⁷ For a discussion of the concept of the invisibility of lesbian existence, see Adrienne Rich (1980).

⁸ In *Modinos v. Cyprus* (1993), the ECtHR noted that, following *Dudgeon v. the United Kingdom* (1981), the Cypriot Attorney General had not instituted any prosecution for homosexual conduct that could be in breach of Article 8 ECHR. The legislation, as in the case of Northern Ireland, remained on the statute books.

⁹ Part of the infamous ‘Operation Spanner’ in the UK.

¹⁰ In the description of the ECtHR these consensual practices included various forms of maltreatment of genitalia, ritualistic beatings with bare hands or other instruments, as well as forms of branding that left no serious injuries to the participant (*Laskey, Jaggard and Brown v. the United Kingdom*, 1997: para. 8).

¹¹ For the 1967 Sexual Offences Act, section 1(7), an act was not be considered private if more than two persons were taking part or were present. This only applied to ‘gross indecency’ committed by men.

¹² The most notable examples, in this regard, are cases such as *Schalk and Kopf v. Austria* (2010), *X. and Others v. Austria* (2013), as well as *Fretté v. France* (2002) and *E.B. v. France* (2008).

¹³ This consists in the attempt within the military to enhance ‘sex talk’ so that the creation of a public dimension of homosexuality has as its direct effect that of confining this same aspect in the private sphere, therefore paradoxically denying it.

¹⁴ The judgements were issued on the same date (27 December 1999), and the ECtHR substantially replicates its arguments in both, except the specific circumstances of the cases submitted by the applicants.

¹⁵ See ECtHR, *Case 104-55, X. v. Federal Republic of Germany*, Yearbook I (1955-57), ECtHR, *Case 167/56, X. v. Federal Republic of Germany*, Yearbook I (1955-57), ECtHR, *Case 530/59, X. v. Federal Republic of Germany*, Collection of Decisions, and ECtHR, *Case 5935/72, X. v. Federal Republic of Germany*, D&R.

¹⁶ In this case, the ECtHR had conceded that it was necessary to go beyond the ‘biological criteria’ in the definition of the gender of the spouse, thus allowing transgender persons to marry someone of the opposite gender.

References

Ammaturo, F.R. 2014. The Right to a Privilege? Homonormativity and the Recognition of Same-sex Couples in Europe. *Social and Legal Studies* 23(2): 175-194.

Ammaturo, F.R. 2015. The “Pink Agenda”: Questioning and Challenging European Homonationalist Sexual Citizenship. *Sociology* 49(6): 1151-1166.

Ammaturo, F.R. 2016. *European Sexual Citizenship: Human Rights, Bodies and Identities*. Basingstoke: Palgrave.

Ashford, C. 2014. (Homo)Normative Legal Discourses and the Queer Challenge. *Durham Law Review* 1: 77-98.

Baron, J.B. and Epstein, J 1982. *Language and the Law: Literature, Narrative and Legal Theory*. In Kairys, D. (ed.) 1982. *The Politics of Law: a Progressive Critique*. New York: Basic Books, pp. 662-679.

Beger, N.J. 2009. *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices*. Manchester: Manchester University Press.

Bell, D., Binnie, J. 2000. *The Sexual Citizen: Queer Politics and Beyond*. Cambridge: Polity Press.

Bernstein, M. 1997. Celebration and Suppression: the Strategic Uses of Identity by the Lesbian and Gay Movement. *American Journal of Sociology* 103(3): 531-565.

Bobbio, N. 1996. *The Age of Rights*. Cambridge: Polity Press.

Brontsema, R. 2004. A Queer Revolution: Reconceptualising the Debate over Linguistic Reclamation. *Colorado Research in Linguistics* 17(1): 1-17.

Califia, P. 1995. *Public Sex: Culture of Radical Sex*. Pittsburgh: Cleis Press.

Commissioner for Human Rights of the Council of Europe. 2011. *Discrimination on Grounds of Sexual Orientation and Gender Identity*. Strasbourg: Council of Europe Publishing.

Croce, M. 2014. Desiring What the Law Desires: a Semiotic View on the Normalisation of Homosexual Sexuality. *Law, Culture and the Humanities*. October 7, 2014.

De Salvia, M. 2006. *La Convenzione Europea dei Diritti dell'Uomo*. Napoli: Editoriale Scientifica.

Donovan, J. 1993. Homosexual, Gay, and Lesbian: Defining the Words and Sampling the Populations. *Journal of Homosexuality* 24(1-2): 27-47.

Duggan, L. 2003. *The Twilight of Equality: Neoliberalism, Cultural Politics, and the Attack on Democracy*. Boston: Beacon Press.

Foucault, M. 1998. *The History of Sexuality: the Will to Knowledge*. London: Penguin.

Franke, K.M. 2004. The Domesticated Liberty of Lawrence v. Texas. *Columbia Law Review* 104: 1399-1426.

Gamson, J. 1995. Must Identity Movements Self-Destruct? A Queer Dilemma. *Social Problems* 42(3): 390-407.

-
- Grigolo, M. 2003. Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject. *European Journal of International Law* 14(5): 1023–1044.
- Hunt, A. 1986. The Theory of Critical Legal Studies. *Oxford Journal of Legal Studies* 6(1): 1-45.
- Johnson, P. 2012. *Homosexuality and the European Court of Human Rights*. London: Routledge.
- Johnson, P. 2016. *Going to Strasbourg: an Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*. Oxford: Oxford University Press.
- Joshi, Y. 2012. "Respectable Queerness". *Columbia Human Rights Law Review* 43(2): 415-467.
- Leach, P. 2011. *Taking a Case to the European Court of Human Rights*. Oxford: Oxford University Press.
- Lockwood, P and Kunda, Z. 1997. Superstars and Me: Predicting the Impact of Role Models on the Self. *Journal of Personality and Social Psychology* 73(1): 91-103.
- Marx, K. 1977. 'On the Jewish Question'. In McLellan, D. 1977. *Karl Marx Selected Writings*. Oxford: Oxford University Press.
- McGuigan, J. 2014. The Neoliberal Self. *Culture Unbound: Journal of Current Cultural Research* 6(1): 223-240.
- Motschenbacher, H. 2010. *Language, Gender and Sexual Identity, Poststructuralist Perspectives (Vol. 29)*. Amsterdam / Philadelphia: John Benjamins Publishing.
- NeJaime, D. 2003. Marriage, Cruising, and Life in between: Clarifying Organisational Positionalities in Pursuit of Polyvocal Gay-based Advocacy. *Harvard Civil Rights-Civil Liberties Law review* 38: 511-562.
- O'Byrne, D.J. 2012. On the Sociology of Human Rights: Theorising the Language-Structure of Rights. *Sociology* 46(5): 829-843.
- O'Byrne, D.J. 2016. *Human Rights in a Globalising World*. Basingstoke: Palgrave.
- O'Connell, R. 2009. Cinderella comes to the Ball: Art. 14 and the Right to Non-Discrimination in the ECHR. *Legal Studies* 29(2): 211-229.
- Rich, A. 1980. Compulsory Heterosexuality and Lesbian Existence. *Signs: Journal of Women in Culture and Society* 5(4): 631-330.
- Richardson, D. 2004. Locating Sexualities: From here to Normality. *Sexualities* 7(4): 391-411.

Roan K. 2002. "Either/Or" and "Both/Neither": Discursive Tensions in Transgender Politics. *Signs*, Vol. 27(2): 501-522.

Romero, A.P. 2009. *Methodological Descriptions: "Feminist" and "Queer"*. In Fineman, M.A., Jackson, J.E. and Romero, A.P. (eds.). *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*. Farnham: Ashgate, pp.179-198.

Rorty, R. 2011. *Human Rights, Rationality, and Sentimentality*. In Rathore, A.S. and Cistelecan, A. 2011. *Wronging Rights: Philosophical Challenges for Human Rights*. Abingdon: Routledge, pp. 107-131.

Rubin, G. 1998. *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*. In Nardi, P.M. and Schneider, B. E. (eds.) 1984. *Social Perspectives on Lesbian and Gay Studies: a Reader*. Abingdon: Routledge, pp. 100-133.

Stychin, C.F. 2003 (a). Same-sex Sexualities and the Globalisation of Human Rights Discourse. *McGill Law Journal*. 49: 951.

Stychin, C.F. 2003 (b). Sexual Citizenship in the European Union. *Citizenship Studies* 5(3): 285-301.

Swennen, F., Croce, M. 2015. The Symbolic Power of Legal Kinship Terminology. An Analysis of "Co-motherhood and "Duo-motherhood" in Belgium and the Netherlands. *Social and Legal Studies* 25(2): 181-203.

Turner, B.S. 1993. Outline of a Theory of Human Rights. *Sociology* 27(3): 489-512.

Voeten, E. 2007. The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights. *International Organisation* 61(4): 669-701.

Ward, I. 1998. *An Introduction to Critical Legal Theory*. Abingdon: Routledge Cavendish.

Warner, M. 1993. *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis: University of Minnesota Press.

Waters, M. 1996. Human Rights and the Universalisation of Interests: Towards a Social Constructionist Approach. *Sociology* 30(3): 593-600.

Wintemute, R. 1995. *Sexual Orientation and Human Rights: the United States Constitution, the European Convention and the Canadian Charter*. Oxford: Clarendon Press.

Zwicky A. 1997. *Two Lavender Issues for Linguists*. In Livia, A. and Hall, K. (ed.) 1997. *Queerly Phrased: Language, Gender, and Sexuality*. New York: Oxford University Press, pp. 21-34.

List of Case Law

ECtHR, Case 104-55, *X. v. Federal Republic of Germany*, Yearbook I (1955-57).

ECtHR, Case 167/56, *X. v. Federal Republic of Germany*, Yearbook I (1955-57).

ECtHR, Case 530/59, *X. v. Federal Republic of Germany*, Collection of Decisions.

ECtHR, Case 5935/72, *X. v. Federal Republic of Germany*, D&R.

ECtHR, *Handyside v. the United Kingdom*, Application No. 5493/72, judgement 07 December 1976.

ECtHR, *Tyrer v. the United Kingdom*, Application No. 5856/72, judgement 25 April 1978.

ECtHR, *Dudgeon v. the United Kingdom*, Application No. 7525/76, judgement 20 October 1981.

ECtHR, *Norris v. Ireland*, Application No. 10581/83, judgement 26 October 1988.

ECtHR, *Modinos v. Cyprus*, Application No. 15070/89, judgement 22 April 1993.

ECtHR, *Laskey, Jaggard and Brown v. the United Kingdom*, Applications Nos. 21627/93, 21826/93 and 21974/93, judgement 19 February 1997.

ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, Application No. 31417/96 and 32377.96, judgement 27 September 1999.

ECtHR, *Smith and Grady v. the United Kingdom*, Application No. 33895/96 and 33986/96, judgement 21 December 1999.

ECtHR, *A.D.T. v. the United Kingdom*, Application No. 35765/97, judgement 31 July 2000.

ECtHR, *Fretté v. France*, Application No. 36515/97, judgement 26 May 2002.

ECtHR, *Goodwin v. the United Kingdom*, Application No. 28957/95, judgement 11 July 2002.

ECtHR, *Karner v. Austria*, Application No. 40016/98, judgement 24 July 2003.

ECtHR, *K.A. and A.D.V. v. Belgium*, Applications Nos. 42758/98 and 45558/99, judgement 17 February 2005.

ECtHR, *E.B. v. France*, Application No. 43546/02, judgement 22 January 2008.

ECtHR, *Pay v. the United Kingdom*, Application No. 32792/05, judgement 16 September 2008.

ECtHR, *Schalk and Kopf v. Austria*, Application No. 30141/04, judgement 24 June 2010.

ECtHR, *Mosley v. the United Kingdom*, Application No. 48009/08, judgement 10 May 2011.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60

ECtHR, *X and Others v. Austria*, Application No. 19010/07, judgement 19 February 2013.

For Peer Review Only